IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.80 of 1990

==========

Arjun Mahto alias Arjun Singh, son of late Kashi Mahto, resident of Village Mahammadpur, P.S. Guraru, Dist. Gaya.

.... Appellant

Versus

The State of Bihar

.... Respondent

==========

Appearance :
For the Appellant : Mr. Dinu Kumar, Adv.
Mr. Shiv Kumar Prabhakar, Adv.
Mr. Arvind Kumar Sharma, Adv.
For the Respondent : Ms. Shashi Bala Verma, APP

==========

CORAM: HONOURABLE MR. JUSTICE MIHIR KUMAR JHA
and
HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI

ORAL JUDGMENT
(Per: HONOURABLE MR. JUSTICE MIHIR KUMAR JHA)
Date: 27-06-2012

This appeal is directed against the judgment dated 13.2.1990 passed by 7th Additional Sessions Judge, Gaya in Sessions Trial No. 1 of 1982/12 of 1988 convicting the sole appellant for offence under Section 396 of the Indian Penal Code with a sentence of rigorous imprisonment for life.

2. The prosecution case in brief is that on 2.6.1976 the informant (P.W.4) had heard the sound of hurling of bomb from the side of the house of Ishwar Singh (P.W.3) and when he came out, he had found a few dacoits in the Gali and, thus, out of fear he had gone inside his own house. The informant had claimed also that thereafter he had raised Hulla and after the dacoits had fled away from the house of Iswar Singh, he having reached over there had found both Indradeo

Singh as also Kalo Devi to be dead while Sheo Kumar Singh (P.W.7) in an injured condition. The informant had stated that thereafter he had gone to the police station and had got his First Information Report recorded wherein it was his specific case that neither he was an eye witness to the occurrence of dacoity nor he had identified any of the miscreants.

3. The police on the basis of the aforementioned First Information Report having instituted Paraiya P.S. Case No. 1(2)76 had taken up investigation and in course of such investigation, on the basis of Test Identification Parade held, had submitted charge-sheet against four persons including the appellant Arjun Mahto @ Arjun Singh. After taking cognizance, the case, being exclusively triable by the court of sessions, was committed to the court of sessions on 3.2.1978 whereafter the trial was taken up. In course of trial, seven witnesses in all had been examined apart from exhibiting five documents. It is significant to note here that in course of trial, one of the co-accused had died and because none of the prosecution witness had identified the other two co-accused persons in court, the only remaining appellant Arjun Mahto had been found to be guilty on the basis of the evidence adduced was convicted and sentenced in the manner indicated above.

4. Mr. Dinu Kumar, learned counsel for the appellant

while assailing the impugned judgment has submitted that it is a case of single identification of the appellant in course of T.I. Parade by P.W.7 and such identification does not inspire confidence because P.W.7 in his deposition has accepted that the appellant was well known to him from the school days. In this regard, he has also placed reliance on Test Identification Parade Chart (Exbt. 4) to contend that not only such belated T.I. Parade held after 53 days of occurrence would be of hardly any evidentiary value specially when the prescribed procedure in the Bihar Police Manual for holding such T.I. Parade was also not followed. He has further submitted that non-examination of the Investigating Officer by the prosecution has vitally prejudiced the appellant, inasmuch as, the statement of P.W.7 before the Investigating Officer as with regard to identification of the dacoits including the appellant and the source of identification claimed by the P.W.7 could not be tested. Mr. Kumar has also highlighted that if the P.W.7 could identify the appellant as a footballer of his school days nothing had prevented him to at least disclose his identity in his earliest statement given to the police when he had been taken to the hospital immediately after the occurrence. He has also assailed the findings of the trial court in the impugned judgment by describing them to the speculative in nature without there being any evidence to support them.

5. Per contra, learned counsel for the State while defending the impugned judgment has submitted that the factum of dacoity and two murders taking place in course of dacoity has been proven not only by the informant P.W.4 but also the house owner P.W.3, the father of P.W.7. She has further submitted that the other part relating to identification has also been proven by the evidence of P.W.7 who had identified the appellant in course of T.I. Parade. As with regard to the infirmities in the T.I. Parade, she has explained that once the Magistrate himself had conducted the Test Identification Parade, there would be little for the appellant to contend any infirmity in course of such T.I. Parade. Finally, she has submitted that the offence under Section 396 of the Indian Penal Code being heinous, the conviction of appellant on the basis of his identification in the T.I. Parade and its being also supported in court by P.W.7 would require no interference by this Court

6. Before analyzing the aforesaid aspects, it would be necessary for us to take stock of the evidence on record.

7. The prosecution has examined in all seven witnesses out of whom P.W.1 Mahangu Yadav has claimed to be an eye witness to the occurrence. P.W.2 Sitaram Singh is a formal witness who has proven two inquest reports (Exbt. 1 & 1/2). P.W.3 Ishwar Singh is the house in owner whose house the offence of murder in course of

dacoity is said to have been committed. P.W.4 as noted above is the Haldhar Yadav the informant is the neighbour of P.W.3 Ishwar Singh. P.W.5 Dr. Din Dayal Singh is the doctor who had conducted postmortem and proven his two postmortem reports (Exbt. 3 & 3/1) P.W.6 Prabhat Kumar Sinha is the then judicial magistrate who had conducted Test Identification Parade and has proven Test Identification Parade Chart (Exbt. 4) and P.W.7 Sheo Kumar Singh is son of P.W.3 Ishwar Singh, an injured eyewitness. The prosecution as noted above in addition to oral evidence has also led documentary evidences. Exbt. 1 & 1/a are inquest reports of the two deceased persons, Exbt. 2 is the First Information Report, Exbts. 3 & 3//1 are the two postmortem reports, Exbt. 4 is the chart of Test Identification Parade and Extbt. 5 is the Fardbeyan of P.W.7, Sheo Kumar Singh recorded by the police in the hospital.

8. The defence has neither examined any witness nor has exhibited any document. From the trend of cross-examination, the defence of the sole appellant is one of false implication on account of long-lasting enmity as also a tainted identification of the appellant by the sole witness P.W.7, who is said to be well known to him right from the school days.

9. As noted above, P.W.4 the informant in this case at best is the person who has made the police to roll into action,

inasmuch as, he has neither claimed to have seen the occurrence nor has identified the miscreants. His deposition, therefore, can only lead to corroboration with regard to the commission of the offence of dacoity and murder but nothing more can be found therein.

10. It is P.W.3 Ishwar Singh and his son P.W.7 Sheo Kumar Singh who could be possibly the eye witnesses to the occurrence and could have also identified the miscreants including the appellant because the occurrence had taken place in their house. It is, however, significant to note here that though the factum of dacoity and murder in course of dacoity has been supported by the P.W.3 but he does not claim to have identified any of the miscreants including the appellant. It is, however, very significant to take into account that in his deposition, he had claimed that the occurrence dacoity and murder of his family member in course of dacoity as also injury on his son P.W.7 had taken place wherein he could not identify anyone including the person who had caused Chhura injury on his injured son P.W.7. The said witness in cross-examination however had specifically asserted that his son, after the occurrence and leaving of the dacoits, had informed him (P.W.3) that he had identified a few of the dacoits by face. This aspect of the matter becomes significant because P.W.7, the only other witness on the point of identification has not only denied this aspect specifically but has also neither in his

examination-in-chief nor in cross examination given any inkling that he had identified any of the accused persons by stature or any other mark of identification or even getup.

11. P.W.7 in his deposition has in fact stated that immediately after the occurrence, he had been taken to the hospital well within fifteen minutes of the occurrence by some of the villagers and his statement had also been recorded in the hospital by another police officer, but since that statement had reached the concerned police station at a later point of time, the same had not been treated to be First Information Report, inasmuch as, well before that, the First Information Report was already lodged by the P.W.4. In that view of the matter, it is the version of P.W.7 in the court which alone has to be tested. Unfortunately, in this case, the Investigating Officer (I.O.) has not been examined and therefore the statement of P.W.7 given to the I.O. cannot be tested. P.W.7 in his examination-in-chief in the court has not only supported the factum of occurrence as with regard to dacoity and murder of his two family members in course of dacoity but had also claimed to have identified two dacoits including the appellant in course of Test Identification Parade. It has, however, to be kept in mind that P.W.7 in course of his deposition in the year 1989 had disclosed his age as 28 years and to have been employed in a government office whereas the occurrence had taken place in the

year 1976 when P.W.7 was aged about 15 years and hence a minor. His identification of the appellant made on 24.7.1976 in T.I. Parade after 53 days of the occurrence has to be thus examined very carefully. In this regard, it is significant to note here that in course of T.I. Parade, he had identified the appellant by claiming him to be the same person who was his schoolmate and a footballer. The question, therefore, would be that if he had already identified the sole appellant after 53 days to be the footballer and thus well acquainted with him what had prevented him in putting this fact and naming him to his family members and/or before the Investigating officer?

12. It is this aspect of the matter which was put to him by the trial court itself. In paragraph no.19 of his deposition his answer to the court question was as follows:-

> *"मुदाले अर्जुन के पिता का नाम मालूम नहीं है। यह किस गॉव के निवासी हैं यह भी मालूम नहीं है। मुदाले अर्जून 1972 में मैट्रिक में पढ़ते थे। मैं 1973 से 1975 तक पढ़ा। जब मै 1973 में वहॉ पढ़ने गया उस वक्त ये वहॉ स्कूल में थे या नहीं, नहीं कह सकता। ये कभी कभी फुटबॉल खेलने आते थे। जब मैं टी.आइ.परेड पर मुदाले को देखा उसी वक्त हमारे ध्यान में आया कि अर्जुन मुदाले जो डकैती में था फुटबॉल खेलने स्कूल के फिल्ड में आता था। डकैती के बखत इसे देखने पर यह बात ध्यान में नहीं आयी थी।"*

13. The said admission on the part of the P.W.7 coupled with the fact that he had accepted that he was also studying in one of the two high schools of the same town which had also a common hostel and a common football ground would leave nothing

for speculation that there was every possibility of the appellant being named had he been the member of the dacoits by the P.W.7.

14. Thus, when it is a case of single identification of the appellant by P.W.7, it has to be examined and viewed very cautiously. It must be made clear that even a single identification corroborated from other evidence can lead conviction under Section 396 of the I.P.C. but at least that single identification must be free from any doubt. There is, however, a major chink in the prosecution case on the issue of source of identification of the dacoits, inasmuch as, no source of identification has been disclosed by any witness. In the impugned judgment, the trial court has made a speculation that the dacoits must have been carrying torch in their own hands and as such, it was possible to identify the dacoits including the appellant in the torch light being carried by them (dacoits). It is very difficult to accept such reasoning of the trial court because the crucial question would still be that if there is no evidence to this effect, how could the trial court would make speculation specially the flashing of torch by dacoits on his own face to facilitate identified by P.W.7. As a matter of fact, P.W.7 having been put this question specifically had stated in paragraph no.16 that he had identified the dacoits in torch light and had stated this fact to the police but its correctness could not be tested due to non-examination of the Investigating Officer. This vital aspect

being not allowed to put to I.O. has prejudiced the appellant and his defence and thus non-examination of the Investigating Officer has weakened the prosecution case to a great extent.

15. The evidentiary value of identification of a person in Test Identification Parade can never be undermined then it has to be also proven by the prosecution that such identification in T.I. Parade was made in a prescribed manner in accordance with the provisions of police manual. Here on this score also, the evidence is quite weak, inasmuch as, P.W.6, the Magistrate conducting the Test Identification Parade has nowhere stated with regard to the observance off the norms under Rule 236 of the Bihar Police Manual, which reads as follows:-

> *"236. (a) Whenever it is necessary that a person suspected of having been concerned in any offences should be identified by a witness, the following instructions shall be complied with word by word:-*
>
> *(1) These suspects shall be kept at a place where identifying witness cannot have access to him.*
>
> *(2) At the time of taking the suspects to Court or Jail, precaution shall be taken that none is able to see them and hence they shall be taken in closed vehicles or if such vehicles are not available, their faces shall be covered in such a manner that they cannot be recognized.*
>
> *(3) As far as possible, the photographs of suspected persons shall not be published before identification.*
>
> *(4) The investigator shall not keep suspected persons in Police custody before holding Test identification.*

(5) *The prosecutor shall request the Magistrate that these persons should not be released on bail before identification.*

(6) *If the physical characteristics of any suspected person are such that on account of these, he can be searched in a group, then as far as possible such persons shall be assembled for mixing up who have similar characteristics or the characteristics shall be covered. The investigator shall see before identification parade begins that the suspected person is available in it.*

(7) *For identification, one suspected person is to be mixed with 8-10 other persons and not that ten suspected persons shall be mixed in a small group.*

(8) *Identification should be done without delay because identification done with delay is not fully acceptable to Courts.*

(9) *Where the description of suspected persons in the first information report or in the statements of witnesses are so explicit that there is no suspicion left of any kind, it is not essential to hold identification parade.*

(10) *The investigating officer though his presence may be essential outside shall not be present while the identification is in progress.*

(11) *If a witness is unable to attend an identification parade and identification is considered necessary, this may be arranged with reference to photograph, details of which are incorporated in Appendix 22.*

(12) *When suspected persons are brought for identification its chart shall be prepared in P.M. Form no.42. An identification of the above facts should be given in case diary and identification chart."*

16. This Court has minutely perused the Exhibit-4, the Test Identification Parade Chart, from which it transpires that in

course of Test Identification Parade held on 24.7.1976 at Central Jail, Gaya, only two identifying witnesses, namely, Shiv Kumar Singh and Mahangu Yadav were brought forward to identify the suspects. From Column-3 of the Test Identification Chart, it appears that as many as nine persons namely Ram Kishun Bhuiyan, Kishore Bhushan, Maheshi Dushad, Mahima Bhuiyan, Kuleshwar Bhuiyan, Prem Bhuiyan, Paltu Bhuiyan, Julumdhar Bhuiyan and Arjun Mahto were the suspects who were put on Test Identification Parade but Colomn-5 shows that the prescribed Rule 236(7) was not followed, inasmuch as, all that has been recorded as with regard to the description of the manner in which identification was effected is;

"*Suspects were made up with eight men of similar dressed and the same region and appearance.*"

17. It is thus clear that when each of the suspected persons was to be mixed with eight to ten persons as per the requirement of Rule 236 of the Bihar Police Manual, in the present case nine suspects were only mixed up with eight men, which would vitiate the entire concept of the Test Identification Parade. As a matter of fact, the identification made of the appellants by Shiv Kumar Singh that he had asked him (P.W.7) as to where was the gun at the time of occurrence would hardly inspire any confidence when this fact was never stated by him in his deposition. In fact, the identification of the

sole appellant by the P.W.7 stating that he was a footballer known to him from school days and his version in course of Test Identification Parade having no support from his oral evidence in court would put a question mark on the identification of the sole appellant, inasmuch as, it is a case of one identification in which the Test Identification Parade conducted after 57 days was also not held in the prescribed manner as laid down in Rule 236 of Bihar Police Manual. Thus on the basis of such tainted and vitiated single identification it would be wholly unsafe to convict the sole appellant.

18. The law with regard to identification in Test Identification Parade was examined way back in the case of ***Vaikuntam Chandrappa & Ors. Vs. State of A.P.*** reported in ***AIR 1960 SC 1340*** where it was held that the statement of a witness in the court is the substantive evidence and the purpose of the Test Identification Parade is to test that evidence. The Apex Court had also held that the safe rule is that the sworn testimony of witnesses in court as to the identity of the accused who are strangers to the witnesses requires corroboration. It was in this regard that the Apex Court in the aforesaid case had also held that when there was no substantive evidence about the appellant having been one of the dacoits at a point of time, P.W.2 saw them in course of occurrence, the Test Identification Parade against him cannot be said to be of any assistance to the prosecution.

19. The law as with regard to the single identification has also been gone by the Apex Court in the case of ***Wakil Singh & Ors. Vs. State of Bihar*** reported in ***1981(supplementary) SCC 28*** wherein it was held as follows:-

> *"2. In the instant case we may mention that none of the witnesses in their earlier statements or in oral evidence gave any description of the dacoits whom they have alleged to have identified in the dacoity, nor did the witnesses give any identification marks viz., stature of the accused or whether they were fat or thin or of a fair colour or of black colour. In the absence of any such description, it will be impossible for us to convict any accused on the basis of a single identification, in which case the reasonable possibility of mistake in identification cannot be excluded. For these reasons, therefore, the trial Court was right in not relying on the evidence of witnesses and not convicting the accused who are identified by only one witness, apart from the reasons that were given by the trial Court. The High Court, however, has chosen to rely on the evidence of a single witness, completely overlooking the facts and circumstances mentioned above. The High Court also ignored the fact that the identification was made at the T.I. parade about 3 1/2 months after the dacoity and in view of such a long lapse of time it is not possible for any human being to remember, the features of the accused and he is, therefore, very likely to commit mistakes. In this circumstances unless the evidence is absolutely clear, it would be unsafe to convict an accused for such a serious offence on the testimony of a single witness."*

20. Thus, having regard to the aforementioned aspect of single identification of the sole appellant and the fatal infirmities in the prosecution case as discussed above, this Court has no option but

to hold the conviction of the appellant to be bad both on fact and in law.

21. In the result, the appeal is allowed. The judgment of his conviction and sentence is, accordingly, set aside and the sole appellant is acquitted of his charge.

22. Since the appellant is already on bail, he would stand discharged of the liabilities of his bail bonds.

(Mihir Kumar Jha, J)

(Aditya Kumar Trivedi, J)

Rishi/-